

**BEFORE THE PUBLIC SERVICE COMMISSION**  
**OF THE STATE OF DELAWARE**

IN THE MATTER OF THE PETITION       )  
OF VIVINT SOLAR, INC. FOR A       )       PSC DOCKET NO. 15-1358  
DECLARATORY ORDER                       )  
(FILED AUGUST 28, 2015)                       )

**ORDER NO. 8840**

**AND NOW**, this 5<sup>th</sup> day of January, 2016, the Delaware Public Service Commission ("Commission") determines and orders the following:

**WHEREAS**, on August 28, 2015, Vivint Solar, Inc. ("Vivint Solar") filed a petition ("Petition") with the Commission which requested a declaratory order clarifying that, in offering solar power purchase agreements ("PPAs") or solar leases to residential customers in the State of Delaware, neither Vivint Solar nor any of its subsidiaries or affiliates would be regulated by the Commission as (i) a "public utility" under 26 *Del. C.* § 201 or (ii) an "electric supplier" under 26 *Del. C.* § 1012; and

**WHEREAS**, the Energy Freedom Coalition of America, LLC ("EFCA") timely filed (i) a petition for leave to intervene in this docket and (ii) written comments on the Petition. In its petition for leave to intervene, EFCA stated it represents several member companies that provide solar energy facilities and services in Delaware; and

**WHEREAS**, EFCA's petition for leave to intervene was granted by the hearing examiner whom we assigned to review such filings; and

**WHEREAS**, EFCA's written comments included the following:

EFCA respectfully requests that the Commission grant the Petition and find that **all** solar leases and PPAs similar to those described by Vivint are exempt from regulation by this Commission .... The Commission should be cautious not to create uncertainty for the rest of the solar industry by granting Vivint's requested relief too narrowly.

Comments of EFCA at p. 2 (emphasis in original); and

**WHEREAS**, the Commission solicited public comments regarding the Petition by publishing legal notice in two newspapers of general circulation in the State of Delaware and also publicly noticed an evidentiary hearing for this matter; and

**WHEREAS**, the Commission has reviewed the record regarding the Petition and has deliberated in public at its duly-noticed evidentiary hearing held on November 24, 2015;

**NOW, THEREFORE, IT IS ORDERED BY THE AFFIRMATIVE VOTE  
OF NOT FEWER THAN THREE COMMISSIONERS:**

1. The legal issue presented in the Petition can be summarized as this: Do Vivint Solar's actions subject it our regulation under the Public Utility Act, 26 Del. C. ch. 26?

2. At the evidentiary hearing Vivint Solar stated (i) it needed clarity before beginning to operate in Delaware, (ii) it desires to be squarely within the law in any state in which it operates, and (iii) it has not been able "to see this clear line of sight to whether or not it would be regulated."<sup>1</sup> Vivint Solar also pointed out that in other states where it operates, the

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<sup>1</sup> See hearing transcript at page 41.

regulations clearly provide that third-party owners of solar projects are not regulated as either [public] utilities or electric suppliers.

3. Chapter 10 of Title 26 of the Delaware Code provides that "Neither customers nor owners of community-owned energy generating facilities shall be subject to regulation as either public utilities or an electric supplier." See 26 Del. C. §1014(e)(9)j. Similarly, our regulations provide that

"[n]othing in these Rules is intended in any way to limit eligibility for net energy metering services based upon direct ownership, joint ownership, or third-party ownership or financing agreement related to an electric generation facility, where net energy metering would otherwise be available.

26 Del. Admin. C. §3001-8.8. As noted by testimony and cross examination at the evidentiary hearing, the parties disagree on whether the Code or our regulations clearly provide for the regulatory status or treatment of the non-community third-party solar providers who participate in contracts or leases for net metering programs in the State of Delaware.<sup>2</sup>

4. Vivint Solar stated at the evidentiary hearing that it takes a conservative approach regarding regulatory compliance and its interpretation of Delaware laws. In contrast, other business entities, such as those who are members of EFCA, currently operate in the State of Delaware without the need for a

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<sup>2</sup> During the evidentiary hearing Staff referenced 26 Del. Admin. C. §3001-8.7.10 which provides that "[n]either customers nor owners of community-owned energy generating facilities shall be subject to regulation as either public utilities or an Electric Supplier." However, as noted by counsel to Vivint Solar, that regulation fails to specifically mention non-community third-party solar providers.

declaratory order setting forth the scope of our jurisdiction. We believe this fact supports our conclusion that the most appropriate remedy here would be through a regulatory rulemaking proceeding rather than issuing a declaratory order for Vivint Solar only. See 29 Del. C. §10114<sup>3</sup> and 29 Del. C. §10102(7).<sup>4</sup>

5. When a party seeks clarity on whether we possess statutory and regulatory jurisdiction over its actions and argues that third-party legal opinions insufficiently provide assurances, such party should petition for regulatory proceedings. This remedy is even more applicable - and would more comprehensively resolve the issues -- when competing unrelated parties in the same industry fail to find the needed level of clarity and differ as to whether they would fall within the statutory definition of a "public utility" or an "electric supplier" based on engaging in the same or similar business transactions.

6. We see no reasons why regulatory rulemaking proceedings would be unable to clarify the issues raised by Vivint Solar in the Petition. To the extent Vivint Solar has raised issues not currently covered by the existing regulations, and to the extent that other companies engaging in similar transactions in the State of Delaware desire more clarity on the

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<sup>3</sup> 29 Del. C. §10114 provides, in pertinent part, that proceedings for the adoption, amendment or repeal of a regulation may be initiated by an agency or at the request of any person who so petitions the agency.

<sup>4</sup> 29 Del. C. §10102(7) provides, in pertinent part, that a "regulation" means any statement of law, procedure, policy, right, requirement or prohibition formulated and promulgated by an agency as a rule or standard, or as a guide for the decision of cases thereafter by it or by any other agency, authority or court.

scope of our jurisdiction, this Commission has the power to re-open its regulations regarding net metering and to clarify such issues not just for Vivint Solar, but for other similarly-situated solar financing and solar leasing companies.

7. Our conclusion also hinges on missing key specific and necessary facts in the Petition that would enable us to determine whether Vivint Solar's PPAs and solar leases would somehow subject the company to our regulatory jurisdiction. More specifically, we are unclear as to the facts upon which we would be basing any declaratory order. For example, the record does not show the specific terms of the PPAs and solar leases which Vivint Solar would offer to Delaware residential customers. If the regulatory rulemaking process were to be used, a more detailed record of the facts could be built regarding the different types of PPAs and solar leases used or to be used by companies in the solar industry in Delaware. Consequently, we would be in a better position after a regulatory rulemaking proceeding to make informed decisions about whether a business entity's actions would subject it to our applicable regulatory authority as either a "public utility" or an "electric supplier" as defined by Delaware law.

8. We also have concerns about the scope of any declaratory order we could issue in this situation. An association of companies in the solar industry (i.e., EFCA) intervened in this docket and argued that any declaratory order issued by us would impact their members. Hence, we recognize the

solar industry's level of interest regarding the key issue here and how our decision would impact the use of PPAs or solar leases in Delaware. We therefore find it prudent not to issue a declaratory order that would be directed to Vivint Solar only. Our regulatory jurisdiction is limited by statute, but it also provides for a solution. Using a regulatory rulemaking proceeding in situations such as this -- when the parties dispute the scope of our authority based on uncertain and changeable facts or actions -- would resolve uncertainly not just for Vivint Solar but for those companies already operating in Delaware.

9. Based on these reasons, the Commission **hereby DENIES** the declaratory order requested in the Petition. (Unanimous 5-0).

10. The Commission reserves the jurisdiction and authority to enter such further Orders in this matter as may be deemed necessary or proper.

**BY ORDER OF THE COMMISSION:**

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Chair

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Commissioner

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Commissioner

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Commissioner

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Commissioner

ATTEST:

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Secretary